BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of:	)	
Accounting for Judgments and	)	CC Docket No 93-240
Other Costs Associated	)	
With Litigation	)	

REPLY COMMENTS OF THE
UNITED STATES TELEPHONE ASSOCIATION

The United States Telephone Association (USTA) respectfully submits these Reply Comments on the Commission's Notice of Proposed Rulemaking (NPRM) in this proceeding, released September 9, 1993. Comments were filed on October 15, 1993.

I. THE COMMENTS OVERWHELMINGLY OPPOSE ADOPTION OF A RULE.

All but two of the Comments filed in response to the NPRM opposed adoption of any rule covering the accounting for litigation expenses. The many opponents of a rule made points that were generally consistent with the filing of USTA. USTA stated that a reconciliation of the twin Litton Costs and Litigation Rules decisions[1] is controlling on the Commission, and does not support the specific proposals in the NPRM. USTA Comments at 3-12. USTA also stated that there was no real need for a rule and that a reasonableness assessment would operate to address any litigation cost issues effectively. It was pointed out that the only application of the rule had not proved to be efficient in practice. USTA Comments at 1-2, 12-18 and 30.

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[1] Mountain States Telephone and Telegraph Co. v. FCC, 939 F.2d 1021 (D.C. Cir. 1991) (Litton Costs decision), and Mountain States Telephone and Telegraph Co. v. FCC, 939 F.2d 1035 (D.C. Cir. 1991) (Litigation Rules decision).

USTA argued that, if the Commission adopts rules dealing with litigation expenses, it should focus on judgments in federal antitrust litigation, of sufficient magnitude to justify the significant accounting changes and the necessary reasonableness evaluation that is required under the controlling law. USTA Comments at 2 and passim. That is apparently what triggered the Commission's interest in the first place - the Litton case, a case in which Commission staff decisions played a significant role in the determination of liability itself.

USTA also stated in its Comments that the Commission should not require the demanding new accounting conditions it proposed, as they are unworkable in practice, and are not consistent with both generally accepted accounting principles (GAAP) and the Commission's own policies. USTA Comments at 18-22.

Only MCI Communications Corporation (MCI) and Scott Rafferty (Rafferty) supported any part of the Commission's proposals. These Reply Comments address those two filings.

II. MCI'S COMMENTS OFFER NO RATIONALE OR JUSTIFICATION FOR A RULE.

USTA disagrees with MCI's conclusion that the Commission should put in place a conclusive presumption. MCI at 2. USTA also disagrees with MCI that any violation of law must automatically be concluded to be contrary to the interests of ratepayers. Id. Even though MCI made these statements, MCI's comments nevertheless recognize that a balancing is needed to determine the ratemaking treatment of litigation costs. Id.

MCI is incorrect in assuming that the litigation costs of a violation of law by a nonregulated entity fall to the bottom line, to be paid by shareholders. MCI at 3-4. That is manifestly not the case. A non-communications business, or even a business like MCI's, does not impose the costs of statutory violations on its shareholders. It recognizes there are additional expenses that must be covered and determines whether a price change is appropriate. A business that is free from regulation will raise its prices to consumers wherever it can do so to recoup the costs of litigation, as will a business like MCI.

MCI advocates extension of a rule to non-antitrust offenses, but except for the Communications Act itself, MCI identifies no statute or group of statutes for the Commission to use in applying a rule. MCI at 5-6. Even without the identification of any statute, MCI notes that, if the Commission were to impose a rule dealing with some form of statutory violation, MCI would support a low threshold. MCI at 9. There is no record to support either argument, and no rule is appropriate in any event.

Finally, MCI supports deferral accounting. MCI at 9. However, MCI articulates no basis for the Commission to find that a carrier should deviate from GAAP or should set up an extensive and costly framework for the identification and classification of litigation costs - a framework that would not provide any improvement on the longstanding case-by-case practices of commissions and carriers with respect to litigation.

As USTA advocated in its Comments, accrual accounting is the appropriate method of accounting for litigation costs. The prevailing rule is that actual measurable outlays for legal defense and other litigation costs by carriers must be recognized as expenses as they are incurred. USTA Comments at 19. Further, the extended segregation and maintenance of the costs of ongoing litigation will burden carriers, will move the costs from one group of ratepayers to others who are not connected with the litigation, and ultimately lead to issues of retroactive ratemaking and to imbalanced handling of the costs of litigation that will depend on whether the case is won or lost. USTA Comments at 19-21. MCI's Comments provide no response to the items articulated by USTA.

III. RAFFERTY'S FACTS DO NOT SUPPORT HIS CLAIMS AND PROVIDE NO BASIS FOR ACTION.

Rafferty's argument is built on one non-statutory situation. Once any case is filed against a carrier, Rafferty would have a rule trigger an advance justification mechanism requiring the carrier to document how any "allegedly unlawful conduct" claimed in the complaint would benefit ratepayers. Rafferty at 1. In pursuing this line of comment, Rafferty points to specific activity that was not even alleged to be a violation of statute, as this proceeding contemplates. Rather, he points to an alleged violation of the Modification of Final Judgment.

Further, the claim made is one in which the carrier ultimately prevailed regarding the claimed violation. The specific violation to which he points is one where

the Justice Department closed its investigation. Rafferty's pleading states that the only tie to ratepayers in his case was Rafferty's own allegation of unlawfulness, subsequently rejected, yet he uses the activity he pursued in the Federal and state courts to support the same type of extensive and costly framework for the identification and classification of litigation costs that MCI demands. In reality, Rafferty would have the Commission change its cost allocation rules and principles in a way that preempts the state of New York. His suggestions also are not needed on the Federal level. On the Federal level, the Part 64 cost allocation principles now in place provide appropriate guidance to carriers with respect to direct and indirect cost allocation, and with respect to joint and common costs.[2] If anything, Rafferty's Comments underline the uniqueness of individual litigation.

Finally, Rafferty disagrees with the level of hourly rates charged by litigation counsel, and he seeks a flat cap on per hour rates. This is unreasonable for a number of reasons. Top litigation counsel would not be able to sustain their hourly rates unless they produced commensurate value for the work. It is clear that these rates are able to be sustained. Obviously, the free market in legal talent accepts rates that Rafferty does not. If the Commission were to require a cap on hourly rates, it would also have the indirect impact of limiting carriers' choices of counsel in ways that will prejudice them.

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[2] Separation of the Costs of Regulated Telephone Services from the Costs of Nonregulated Activities, Report and Order, 2 FCC Rcd 1298 (1987), recon. 2 FCC Rcd 6283 (1987), further recon. 3 FCC Rcd 6701 (1988), affirmed sub nom., Southwestern Bell Corp. v. FCC, 896 F.2d. 1378 (D.C.Cir.1990).

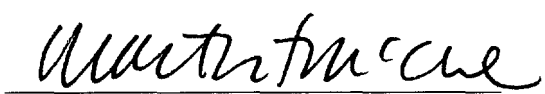
Top talent would be available to the carriers' adversaries, but not the carriers themselves. Since litigation affected by these rules would be between a carrier and another large corporation, such a rule would provide a large advantage to litigants against carriers.

IV. CONCLUSION.

The Commission should accept the twin Litton Costs and Litigation Rules decisions, and should deal with litigation costs on a case-by-case basis where the costs are of sufficient magnitude to justify any Commission rule. The Commission should not adopt a provision for special accounting treatment of litigation expenses that runs counter to GAAP. Further, even if there is to be a targeted rule, there is no record for extension of any rule beyond the antitrust context.

Respectfully submitted,

UNITED STATES TELEPHONE ASSOCIATION

By: 

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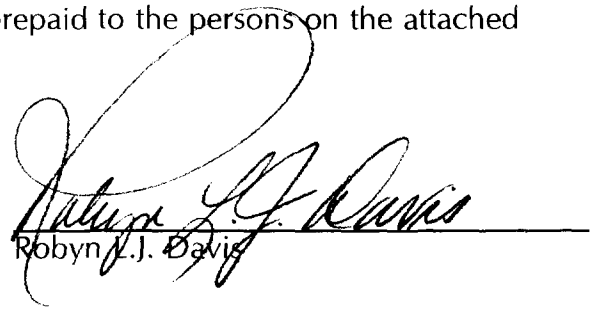
November 5, 1993

CERTIFICATE OF SERVICE

I, Robyn L.J. Davis, do certify that on November 5, 1993 copies of the Reply Comments of the United States Telephone Association were either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the persons on the attached service list.



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